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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH DOUGLAS WILLIS, Defendant and Appellant.	C062714 (Super. Ct. No. 08F04475)

A jury convicted defendant Joseph Douglas Willis of two separate street robberies, and found that he personally used a sawed-off shotgun in their commission. The court sentenced him to state prison.

On appeal, defendant raises only the issue of prosecutorial misconduct during closing argument. Specifically, he asserts a violation of his right to due process of law because the prosecutor trivialized the nature of reasonable doubt, lowering the burden of proof for the prosecution. We affirm the judgment.

FACTS AND PROCEEDINGS

The facts underlying the convictions are not pertinent to the issues on appeal. We will provide a brief distillation for context.

On sequential Sundays in May 2008, two robbers accosted pedestrians in downtown Sacramento in the small hours of the morning. One of the robbers pointed a sawed-off shotgun at the victims and demanded their possessions.

The second victim's cell phone was used in mid-May to call a woman who lived with defendant (the mother of his child). Police used this information, along with surveillance pictures from an ATM where the second victim's credit cards were used, to create a photo line-up. The second victim identified defendant's picture from the photo line-up in June 2008. The first victim, after being unable to decide between two similar photos in the line-up, identified defendant in a live line-up in July 2008. A companion of the first victim during the robbery did not choose defendant in the live line-up, and believed she had seen the armed robber at a party while the case was pending, but was certain at trial that defendant was the robber. The two victims asserted at trial that they had gotten close looks at the armed robber at the time of the crimes and were certain of their identifications of defendant.

Defendant's relatives provided an out-of-state alibi for the second robbery, which was Mother's Day. His father,

however, had previously told police that defendant was out-of-town only on Memorial Day weekend.

At the outset of his closing argument, the prosecutor noted that he would be outlining the instructions on his slides, but the jury should always defer to the instructions from the judge as the ultimate source of the law. He then began with the concept of reasonable doubt (the only portion of his argument with which defendant takes issue). He explained that jurors often struggle with "how much doubt can I have and still say somebody is guilty at the end of the day and how much doubt can a person get before they . . . still have proof beyond a reasonable doubt." He directed the jury to the instruction on reasonable doubt, and discussed the need for the jury to consider the entirety of the evidence and listen to one another in deliberations. Regarding the principle that the evidence does not need to "eliminate all possible doubt because everything in life is open to some possible or imaginary doubt," he noted that no one other than the victims had actually seen the armed robber, so "You should have some doubts in your mind. If you sit here thinking about the facts in this case, you should have some doubts. You weren't there. You didn't see it. We are relying on witnesses that have come into court and testified. We are relying on . . . telephone calls . . . [and] photographs to prove that he is guilty. But when you think about proof beyond a reasonable doubt, if you have a doubt in your mind that is going to cause you to say, [']you know what, I don't think he is guilty because I have doubts,['] you have to

ask yourself, is that doubt reasonable[?] [¶] Kind of what we are talking about is this idea, well, if you go into a forest and you see a tree crash and fall in the forest and it makes kind of a thundering sound as it goes down and hits the ground, well, um, let's say that we weren't in the forest but that same tree fell down. In fact, nobody was in the forest when the tree fell down, did that tree make a thundering sound as it went down and as it hit the ground, or was it silent? We weren't there. You didn't see it. But reason and common sense tells us that that tree made the same thundering sound." At this point, defense counsel objected to the argument as a misstatement of the law. The court overruled the objection. The prosecutor then turned to the other elements of his closing argument.

DISCUSSION

I

Prosecutorial Misconduct

Defendant invokes a pair of decisions in which prosecutorial misconduct took the form of trivializing the standard of reasonable doubt, contending the argument quoted above is analogous and is prejudicial.

People v. Nguyen (1995) 40 Cal.App.4th 28 involved argument that asserted reasonable doubt is "'a very reachable standard that you use every day in your lives when you make important decisions, decisions about whether you want to get married, decisions that take your life at stake when you change lanes as you're driving.'" (*Id*. at p. 35.) *Nguyen* described the choice

of when to change lanes as being “almost reflexive” and the decision to marry as being wrong “33 to 60 percent” of the time based on divorce rates. Therefore, these were poor analogies for the near certainty that reasonable doubt requires in the decision-making process. (*Id*. at p. 36.) However, because the defendant had not objected and requested an admonition, he had forfeited the issue on appeal. (*Ibid*.) Further, the misconduct was harmless because the prosecutor had referred the jury to the actual instruction, which correctly stated the standard. (*Id*. at pp. 35-36.) *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 involved a PowerPoint presentation in which six of eight puzzle pieces were added one by one until all of an image of the Statue of Liberty was visible except the face and the torch. (*Id*. at p. 1264.) The prosecutor then argued (over objection) that everyone would know at this point beyond a reasonable doubt that it was a picture of the Statue of Liberty even without the rest of the pieces. (*Id*. at p. 1265.) We found that the use of a readily recognizable icon could suggest to a jury that it was proper to leap to a conclusion on a far smaller quantum of evidence than would satisfy the standard of reasonable doubt. (*Id*. at pp. 1266-1267.) The use of a certain number of puzzle pieces also suggested an improper quantitative measure of the concept of reasonable doubt set at only 75 percent. (*Id*. at pp. 1267-1268.) The misconduct, however, was harmless because defense counsel vigorously disputed the prosecutor’s analogy in his own closing argument, and the court told the jury that it

would clarify the standard before it instructed the jury with the correct definition. (*Id*. at pp. 1268-1269.)

In the present case, the prosecutor's analogy did not have the same flaw as either of these cases. The comparison with the certainty that a falling tree ordinarily makes a noise does not in any sense suggest an impermissibly low quantitative standard, or liken the jury's task to either making a snap decision based on only piecemeal evidence of a familiar scenario or a decision that ordinarily does not require assurance of the outcome beyond a reasonable doubt. If anything, it reinforced the need for the jury to be as sure of defendant's guilt as it would be that a falling tree made a noise when it hit the ground.

However, even if the prosecutor's argument could in some manner have suggested to even one of the jurors a standard other than reasonable doubt, it was harmless. As in the above two cases, the prosecutor referred the jury to the instructions from the court as being the controlling statement of the law, defense counsel argued at length about the concept of reasonable doubt (his analogy being to the certainty he had in the carabineers that he used when he was part of a mountain "search and rescue team") and also referred the jury to the court's instructions, and the court provided the standard instruction on reasonable doubt. Finally, evidence of defendant's guilt was far stronger than in the two cases cited. We therefore reject his argument.

II

Penal Code Section 4019 Credits

The Supreme Court has granted review to resolve a split in authority over whether the January 2010 amendments to Penal Code section 4019 apply to pending appeals. (*People v. Brown* (2010) 182 Cal.App.4th 1354 (review granted June 9, 2010, S181963) [giving retroactive effect to amendments]; accord *People v. Pelayo* (2010) 184 Cal.App.4th 481 (review granted July 21, 2010, S183552); *People v. Landon* (2010) 183 Cal.App.4th 1096 (review granted June 23, 2010, S182808); *People v. House* (2010) 183 Cal.App.4th 1049 (review granted June 23, 2010, S182183); *contra*, *People v. Rodriguez* (2010) 183 Cal.App.4th 1 (review granted June 9, 2010, S181808); *People v. Otubuah* (2010) 184 Cal.App.4th 422 (review granted July 21, 2010, S184314); *People v. Hopkins* (2010) 184 Cal.App.4th 615 (review granted July 28, 2010, S183724).) This court's miscellaneous order No. 2010-002 (filed March 16, 2010) deems the issue to be included in all pending appeals without further briefing. However, defendant's present convictions are for "serious" and violent felonies (§§ 211, 12022.53; 667.5, subds. (c)(9) & (c)(22); 1192.7, subds. (c)(19) & (c)(40)), so he is among the class of felons who are excluded from additional credit regardless of the outcome (§§ 4019, subds. (b)(2), (c)(2) & (f); 2933.1).

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.